SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1196

RALPH E. COREY and
ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION,
WALLACE C.S. YOUNG, and BETTER
BUILT HAWAII, LTD., Respondents.

REPLY TO BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

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INDEX

Summary of Argument 1
I. Questions Presented by the Mortgagee 2
II. The Mortgagee's Statement of the Case 5
III. The Mortgagee's Argument 13
Conclusion 21

CITATIONS

Cases:

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 21
Chicago B&Q R. Co. v. Chicago, 166 U.S. 266 ..... 2, 3
Gulf, Colorado & Sante Fe Railway Co. v. Ellis, 165 U.S. 150 15
Hawaii v. Mankichi, 190 U.S. 197 16
Hawaii Nat'l. Bank v. Okino, 51 U.S. 367 18
Lear Inc. v. Adkins, 395 U.S. 653 ... 17
Live Oak Ass'n. v. R.R. Com., 269 U.S. 354 5
Loeber v. Schroeder, 149 U.S. 58 17
Missouri v. Gehner, 281 U.S. 313 20
Pennoyer v. Neff, 95 U.S. 714 21
Pim v. St. Louis, 165 U.S. 273 17
Saunders v. Shaw, 244 U.S. 317 ..... 18, 19, 20
Shelley v. Kraemer, 334 U.S. 1 (1947) 4, 21
Tidal Oil Co. v. Flanagan, 263 U.S. 444 17

Yick Wo v. Hopkins, 118 U.S. 356.... 15

Statutes:

Hawaii Revised Statutes
§ 1-1..... 16
§ 602-13..... 20
U.S.C.A., Title 28, Sec. 1257(3).... 18

Rules:

Hawaii Supreme Court Rules
Rule 16..... 20

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Summary of Argument

Judged solely from the standpoint of the mortgagee's Brief in Opposition, this Court should grant certiorari.

The argument advanced by the mortgagee concedes the basic substance of each reason

given by petitioners in their application for the writ.

The mortgagee's Statement of the Case not only fails to point out any inaccuracies in Petitioners' Statement, but contains serious inaccuracies and misstatements in its own presentation.

To refuse the writ on the basis of the mortgagee's Brief in Opposition, this Court must find: (1) there can never be a federal question arising from a decision of a state court of last resort as long as there is an apparent adherence to formal procedural requirements; or (2) whatever the circumstances, this Court lacks jurisdiction to hear federal questions raised in the state court of last resort on a petition for rehearing.

I.

QUESTIONS PRESENTED
BY THE MORTGAGEE

Chicago B&Q R. Co. v. Chicago, 166 U.S.

266, decided by this Court in 1896, answers the Questions Presented" by the mortgagee.

". . . a state may not, by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistant with that amendment. In determining what is due process of law regard must be had to substance not to form.

"It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a state court and brought here by writ of error from the highest court of the State. . . . The Seventh Amendment . . . could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the Courts of the Union, and leave it open for those courts to re-examine in disregard of the rules of Common Law, facts tried by juries empanelled in the state courts in cases which, by reason of the questions involved in them could be brought under the cognizance of the courts of the United States . . .

"In harmony with those views, we may say in the present case that the state court

having jurisdiction of the subject matter and of the parties and being under a duty to guard and protect the constitutional rights here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation . . ." (Emphasis supplied.)

As in the instant case, the Opinion of the appellate court did not refer to the Constitution of the United States, but this Court in Chicago B&Q R. Co. v. Chicago, supra, at page 232, stated:

"There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the National Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits." (Emphasis supplied.)

The above case was cited in Shelley v. Kraemer, 334 U.S.1(1947), where this Court stated:

"That the action of state courts and

judicial officers in their judicial capacities is to be regarded as an action of the State within the meaning of the Fourteenth Amendment, is a proposition that has long been established by the decisions of this court. . . . Although, in construing the terms of the Fourteenth Amendment differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of state government."

II.

THE MORTGAGEE'S STATEMENT OF THE CASE

The Brief in Opposition contains a Statement of the Case which, with minor ellipses and one or two major alterations, is a verbatim transcript of the Opening Brief submitted by the mortgagee in Hawaii Supreme Court No. 5021 (53 Haw. 132).

Briefs in the lower courts are not ordinarily a part of the record. Live Oak Ass'n. v. R.R. Com., 269 U.S. 354, 357-8. When a lower court brief is submitted, as done here, without

record or transcript references, it cannot properly fulfill the function of showing wherein the petitioners' Statement of the Case contains inaccuracies or omissions. To the contrary the inaccuracies are contained in the mortgagee's Brief in Opposition (hereinafter abbreviated Opp. B.), and call for this reply:

Item 1. Repeated reference is made to a "$761,500.00" contract (Opp. B., p. 9, 14, 15, 18, and 22). The contract which contained that figure (Exhibit 4, Civil No. 19985) carried on its face the following condition:

> "The owner shall have the option to pay the contractor an alternate contract amount of: Cost plus 7%, cost being determined by Standard AIA accounting procedure."

Item 2. The Brief in Opposition (p. 9) infers that Mr. Brown calculated the amount of the mortgage by a precise mathematical formula. Mr. Brown, at the trial, was unable to recall the mechanics he used in arriving at the

$857,000 figure (TR. Civil No. 19985, 155-156).

Item 3. The heading, "A. Facts Surrounding the Conspiracy Agreement" (Opp. B., p. 13), is the same used by the mortgagee in its appellate court Opening Brief. Petitioners Corey and Kimbrough, in their appellate court Answering Brief, point out:

> "No conspiracy was pleaded or proved, except in the final amended complaint which was allowed over objection after the jury instructions were settled (TR. 754). The case was not submitted to the jury on a theory of 'conspiracy.'"

There follows, in petitioners' Answering Brief to the appellate court a section of argument entitled: "I. The Appellant's Opening Brief Impermissibly Attempts to Support the Verdict of Fraud by Marshalling the Evidence in Support of a Conspiracy to Defraud." The section concludes:

> "It is respectfully submitted that the 'second' amended complaint, and the section of the State Savings & Loan Opening Brief entitled 'Facts Surrounding the Conspiracy Agreement,' are a calculated effort to

deprive Defendants Corey and Kimbrough of their right to trial by jury and of their right to due process of law."

Most significantly, in its Reply Brief, the mortgagee concedes the following to the appellate court:

> "To be honest with this Court, State Savings at this time is unable to understand how this question is properly a part of the appeal before this court . . . A conspiracy was neither alleged nor tried because the facts are so clear that it is not necessary to do so." (Emphasis supplied.)

Item 4. The mortgagee infers (Opp. B., p. 17) that the contractor's cost estimate was created by the petitioners. To the contrary, Mr. Offer testified that the estimates were his, and that they proved to be accurate (TR. 19985, 322).

Item 5. After repeated references to an M. A. I. appraisal, to be made by an appraiser approved by the mortgagee (Opp. B., pp. 5, 9, 16), the mortgagee categorizes the appraisal as

"the developers' appraisal" (p. 18). This is an obvious attempt to distort the facts, since an independent appraisal was done by Mr. John Hulten, M.A.I., which shows that the value of the land and the proposed improvements fully supports the construction mortgage.

Item 6. The mortgagee's discussion of Civil No. 636 under the heading, "D. Foreclosure of the Mortgage" (Opp. B., pp. 19 et seq.), contains serious misstatements of the record:

(a) While the complaint in Civil No. 636 was amended on October 12, 1965, this was not "after Better Built Hawaii Ltd. . . . had joined the action" (Opp. B., pp. 19-20). The record certified to this Court shows that the mortgagee's original complaint for foreclosure, filed in Civil No. 636 in the Kauai court on July 16, 1965 names Better Built Hawaii, Ltd., as one of the original defendants (R. No. 5021, pp. 458-471).

(b) The mortgagee prevailed in convincing the Kaúai court that it had in personam as well as in rem jurisdiction (R. No. 5021, pp. 601-602). Yet, the mortgagee attempts to convince this Court, as it attempted to convince the appellate court, that Civil No. 636 on Kauai was solely an in rem proceeding. (Opp. B., p. 20).

(c) For no conceivable reason, other than to prejudice the record, the mortgagee refers to the fact that the "persons then in possession of the hotel physically abandoned the hotel after allowing the insurance to lapse . . . the hotel was left without a living soul to maintain and protect it." (Opp. B., p. 20.)

The mortgagee fails to illuminate the situation by showing that it was not Petitioners Corey and Kimbrough or even their mortgagor principal, who abandoned the hotel. It was other reputed owners, with whom the mortgagee had

sided in Chapter X proceedings, who took over and abandoned the hotel.

(d) This Court now has before it pertinent portions of the record from the Honolulu court, Civil No. 19985. A page-by-page comparison between the original complaint (R. 19985, pp. 1-8a) and the amended complaint (R. 19985, pp. 161-169) shows that page 1 (with the exception of the certificate of mailing), is identical with page 161; page 2 is identical with 162; page 3, including the amount claimed as damages, is identical with 163; page 4, including the amount claimed as damages, is identical with 164; page 5 is identical with page 165 down to the paragraph V.

On page 165, a new paragraph V contains an allegation as to the date of discovery of the alleged fraud, necessitated by the filing of Corey and Kimbrough's motion to dismiss (R. 19985, pp. 24-81; 123-125). Paragraphs V and VI on

page 5 are identical to paragraphs VI and VII on page 166, including the amount claimed as damages. The prayer for relief on pages 5 and 6 is identical, including amounts, to the prayer on pages 166-167.

In the face of this record, the mortgagee asserts (Opp. B., p. 22):

> "After the judicial deed had been delivered to State Savings by the commissioner and recorded in the Bureau of Conveyances, State Savings amended its complaint in this action to set forth its exact loss." (Emphasis supplied.)

The record further shows that the Order Confirming Sale in Civil No. 636 was filed on September 28, 1966 (R. 5021, pp. 479-482). This order was the sole and only evidence adduced by plaintiff to show its "loss." The summons and complaint were filed in Civil No. 19985 on September 19, 1966 (R. 19985, p. 1).

It is respectfully submitted that the foregoing misstatements of the record demonstrate the

necessity of this Court granting certiorari. Deliberate misstatements to this Court by the mortgagee would have been unnecessary if the true record could have supported the appellate court's judgment.

III.

THE MORTGAGEE'S ARGUMENT

A.

As pointed out in the Petition, the appellate court: (1) modified the contracts between the mortgagor and the contractor and between the petitioners and the mortgagee by conjectural conclusion (Petition, pp. 47; 20-23; 28); and (2) disregarded the well settled rule in Hawaii that the construction of a contract is a question of law to be decided by the court, and not the jury (Petition, pp. 23-24; 33-35).

The mortgagee's Brief in Opposition (p. 23) concedes that the jury was instructed, over peti-

tioners' objection, to construe the contract between Kimbrough, Corey, and the mortgagee. Without answering petitioners' contention that the settled law of the State is that the construction of a contract is a question of law for the trial judge, the mortgagee, in its Brief in Opposition, merely quotes from the Opinion of the appellate court. The petitioners have already pointed out that the cases cited by the appellate court in that paragraph do not, in any way, relate to the construction of a contract by a jury (Petition for Rehearing, Appendix C of Petition for Writ, pp. 77-78).

The mortgagee's Argument does not answer, and therefore implicitly concedes petitioners' claim that the appellate court did in fact modify the contracts in question by conjectural conclusion.

It is therefore respectfully submitted that, in reference to the contracts, petitioners have

unequivocally established the basis for claiming abridgment of rights and immunities protected by the Fourteenth Amendment to the Constitution of the United States.

B.

The Brief in Opposition contains no discussion of the rights of the petitioners to the equal protection of the laws. The mortgagee takes the position that the Fourteenth Amendment guarantees to a civil litigant only the right to apparent adherence to formal procedural requirements. This sophomoric view of constitutional law is conclusively contradicted by this Court in Gulf, Colorado & Sante Fe Railway Co. v. Ellis, 165 U.S. 150, 159, and Yick Wo v. Hopkins, 118 U.S. 356, 370, cited in the Petition at pages 31 and 41.

By failing to show that the established law is other than that presented in the Petition, the mortgagee admits that the petitioners were

denied their privileges and immunities, due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment in each instance where the appellate court disregarded statutes, rules and decisional law favoring the petitioners.

C.

In Appendix A to the Petition, there is set forth § 1-1 of Hawaii Revised Statutes (Petition, p. 43). The annotations given show that the Statute was first adopted by the laws of 1892 and amended into its present form in 1903. Hawaii v. Mankichi, 190 U.S. 197 (1903) contains a historical review of the status of the common law in Hawaii.

The Petition for the Writ carefully sets forth how Hawaii's rule of res judicata was adopted from the U.S. Supreme Court and applied by the Territory and then by the State of Hawaii (Peti-

tion, pp. 35-39). The failure to apply the rule was cited as an example of how the appellate court's capricious and discriminatory action injected the federal question into the case.

Asserting that the State court did not pass on or decide any federal question (Opp. B., p. 25), is not a response to the contention that it was the Opinion itself which injected the federal questions raised in the petition. (Cf. Lear Inc. v. Adkins, 395 U.S. 653 [1969].)

The mortgagee's citation of McCorquodale v. Texas, 211 U.S. 432 (1908), Loeber v. Schroeder, 149 U.S. 58 (1893) and Pim v. St. Louis, 165 U.S. 273 (1897), in the Brief in Opposition (p. 26), as controlling authority on whether federal questions may be raised on a petition for rehearing is either disingenuous or ingenuous.

In any event, Tidal Oil Co. v. Flanagan, 263 U.S. 444, shows how the Act of 1922 rendered

obsolete 165 U.S. 273, among other cases.

Further, the Petition clearly states (p. 4) that jurisdiction is invoked under Title 28, Sec. 1257(3), which supersedes Act 122, as amended, and subsequent statutes. Irrespective of statutory change, as early as 1917, in Saunders v. Shaw, 244 U.S. 317, 320, this Court stated:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. . . . The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278."

In this connection, the appellate court, itself, was cognizant of the constitutional impact of its decision in the case at bar. Curiously enough, the justice who wrote the Opinion is also the author of the dissent in Hawaii Nat'l. Bank v. Okino, 51 Haw. 367, 370-374 (1969) (noted at

page 33 of the Petition). In that dissent, Justice Kobayashi states (pp. 373-374):

> "The case of Saunders v. Shaw, 244 U.S. 317 (1917), is directly in point. I am at a loss in comprehending the majority's failure to discuss it and disturbed and concerned with the majority's refusal to grant to appellant the substantive right guaranteed by the U.S. Constitution and the State of Hawaii Constitution . . . The majority abuses the power of the appellate court and the result to American Security Bank is a denial of fundamental rights guaranteed by the State of Hawaii and the United States Constitution."

This Court's attention is also respectfully called to the following:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. Citizens National Bank v. Durr, 25 U.S. 99, 106. But here the company, at the first opportunity invoked the protection of the federal Constitution and the laws of the United States. . . . It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the

highest court of the State the federal questions here presented and is entitled to have them considered." Missouri v. Gehner, 281 U.S. 313, 320 (1930), citing Saunders v. Shaw, supra.

D.

That the portion of the Opinion of the Hawaii Supreme Court entitled, "VIII: Attorney Corey's Conduct," donied Petitioner Corey due process of law is conceded by the mortgagee (Opp. B., Argument IV, page 26).

If section VIII is dictum (Opp. B., pp. 3 and 26), by definition it is a judicial opinion on a point other than issues involved in the case. As to this issue, Petitioner Corey was never given an opportunity to be heard (Appendix C to Petition for Writ, pp. 93-98, and Appendix A, Petition for Writ: H.R.S., § 602-13, 605-9, p. 44, and Rule 16, pp. 46-50).

> "The action of State Courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of

course, long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment." Shelley v. Kraemer, 334 U.S. 1, citing Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673; and Pennoyer v. Neff, 95 U.S. 714.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

DATED: Honolulu, Hawaii, this 20th day of April, 1972.

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